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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MAQGUIDE.COM, INC., Plaintiff and Respondent, v. MICHAEL EHLINE, Defendant and Appellant.	B218557 (Los Angeles County Super. Ct. No. BC413670)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary H. Strobel, Judge. Reversed and remanded.

Law Office of Chad Biggins, Chad Biggins for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Appellant Michael Ehline appeals the trial court's denial of his special motion to strike, pursuant to Code of Civil Procedure section 425.16, the malicious prosecution complaint filed against him by respondent MaqGuide.com, Inc. (hereafter "MaqGuide"). Ehline contends that his motion should have been granted because MaqGuide did not carry its burden of demonstrating a probability that it would prevail at trial. Because we conclude that MaqGuide did not present evidence which if credited would have supported a verdict in its favor, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In 2004, Chad Biggins represented Jeffrey Madison dba MaqGuide.com in an action regarding a commission dispute with Avail Corporation. Biggins filed a second action on behalf of Madison against Avail arising out of circumstances revealed during discovery in the first action. In 2005, at Madison's insistence, his friend and attorney, Michael Newlee, associated into the first action to assist Biggins. Biggins, Newlee, and Madison entered into a fee agreement whereby Newlee would receive a 10 percent fee from Biggins's 40 percent contingency fee and between 5 and 10 percent of Madison's 60 percent portion of the recovery. After winning a $1,000,000 verdict in the first action, in July 2006 Madison settled both lawsuits with Avail for a total of $795,000.

After the settlement, Madison and Newlee did not honor their respective agreements with Biggins and refused to pay him his fees and costs as agreed. Madison and Newlee had Avail Corporation make the settlement check payable to MaqGuide, a corporation owned by Madison but which was not a party to the litigation, rather than to Madison. Biggins believed that the check was made out to MaqGuide in order to avoid his lien on the settlement check. Consequently, Biggins filed a lawsuit (hereinafter "the underlying litigation") against Madison, Newlee, and respondent MaqGuide in July 2006. Of the 13 causes of action brought by Biggins against the multiple defendants, only two included allegations specifically directed at MaqGuide: (1) the second cause of action for quantum meruit and (2) the twelfth cause of action for aiding and abetting.

Biggins represented himself in pro. per. throughout the underlying litigation. From time to time, however, several attorneys associated in and out as counsel of record to assist him. One of these attorneys was appellant Ehline, who substituted into the litigation as Biggins's counsel in September 2006 and substituted out in May 2007. Ehline participated in drafting a few motions, which did not concern MaqGuide, and defended Biggins at his deposition.

James Little became counsel of record for MaqGuide in August 2008. After reviewing the files, he "came to the firm conclusion that Mr. Biggins'[s] and Mr. Ehline's prosecution of Maqguide.com, Inc., was frivolous." Consequently, in October 2008, Little purportedly sent Biggins a letter "requesting that they immediately cease and desist any further prosecution of Maqguide.com, Inc., and put them on notice that if they failed to do so they would be subsequently held liable for their malicious prosecution." Because the letter was not sent to Ehline, there is no basis to conclude that he was put on notice of anything contained in the letter. In any event, both Biggins and Ehline submitted declarations attesting that there was no mention, much less a demand, that MaqGuide should be dismissed from the lawsuit prior to trial.

The underlying litigation went to trial in January 2009. During the trial, MaqGuide was dismissed from the litigation on a directed verdict. As to the remaining parties, judgment was entered in favor of Biggins against Madison and Newlee on April 30, 2009. That judgment is on appeal, and the disputed funds are presently in a joint-blocked trust account pursuant to a court order made at the commencement of that lawsuit.

In May 2009, MaqGuide filed suit against Ehline and others for malicious prosecution of the underlying litigation. Ehline filed a special motion to strike that complaint pursuant to Code of Civil Procedure section 425.16 (the "anti-SLAPP motion").[1] After conducting a hearing on the matter, the trial court denied the motion,

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[1] All further statutory references are to Code of Civil Procedure unless otherwise indicated.

stating: "Defendant may have lacked probable cause to maintain the action for breach of contract against [MaqGuide] after the deposit was ordered by the Court and completed. As to malice, an inference can be made that defendant's action was done for an improper purpose based upon the ongoing refusal to dismiss [MaqGuide] from even the breach of contract cause of action." Although MaqGuide sought attorney fees as the prevailing party on an anti-SLAPP motion, the trial court denied the request, ruling that the motion was neither frivolous nor intended solely to cause delay.

Appellant filed a timely notice of appeal from the trial court's denial of the anti-SLAPP motion.

DISCUSSION

"A special motion to strike involves a two-step process. First, the defendant must make a prima facie showing that the plaintiff's 'cause of action . . . [arises] from' an act by the defendant 'in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue.' [Fn. omitted.] (§ 425.16, subd. (b)(1).) [Second, if] a defendant meets this threshold showing, the cause of action shall be stricken unless the plaintiff can establish 'a probability that the plaintiff will prevail on the claim.' (*Ibid.*)" (*Simpson Strong-Tie Company, Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) Because a claim of malicious prosecution necessarily depends upon statements made in a prior judicial proceeding, it is a cause of action arising from protected activity. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735.) Thus, we are presently concerned only with the second step of this process, i.e. whether MaqGuide has established a probability that it will prevail at trial.

"To establish such a probability, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.) Thus, in order to successfully defend the anti-SLAPP motion, MaqGuide was required to support each element of its malicious prosecution cause of action with admissible evidence. "'To establish a cause of

action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].'" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.) The probable cause element is objective – would any reasonable attorney agree that the lawsuit lacked merit (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885), while the malice element is subjective – did the attorney file and prosecute the action with actual hostility or ill will directed at the defendant, or with the "subjective intent to misuse the legal system for personal gain or satisfaction at the expense of the wrongfully sued defendant." (*Downey Venture v. LMI Ins. Co*. (1998) 66 Cal.App.4th 478, 498-499.)

Ehline maintains that MaqGuide failed to present admissible evidence as to two of the three elements of malicious prosecution; to wit, an absence of probable cause and malice. We agree that MaqGuide presented no evidence that Ehline prosecuted the underlying litigation with malice; we therefore need not address the remaining malicious prosecution elements of favorable termination and lack of probable cause.

"The malice element of the malicious prosecution tort goes to the defendant's subjective intent in initiating the prior action. [Citations.] It is not limited to actual hostility or ill will toward the plaintiff. Rather, malice is present when proceedings are instituted primarily for an improper purpose. Suits with the hallmark of an improper purpose are those in which: '. . . (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.'" (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1156-1157.)

To establish the element of malice, MaqGuide relied on the October 2008 letter which attorney Little declared he sent to Biggins. As MaqGuide explains, this letter put Ehline "on notice" that there was no probable cause to continue to prosecute the attorney

fee dispute against MaqGuide. Consequently, Ehline's malice may be inferred from his failure to dismiss MaqGuide after having been put on notice that there was no probable cause to proceed against MaqGuide. For a number of reasons, this letter, and Ehline's response to it, provides no evidentiary support for MaqGuide's conclusion that Ehline acted with malice.

First, Ehline did not represent Biggins at the time the letter was purportedly sent, as he had substituted out of the case in May 2007, some 17 months earlier. As we ruled in *De La Pena v. Wolfe* (1986) 177 Cal.App.3d 481, 485, an attorney cannot be liable for maliciously prosecuting a lawsuit if he was not representing the client at the time the malicious conduct allegedly occurred. Here, MaqGuide acknowledges that there was probable cause to file the lawsuit in July 2006. And until an amendment to MaqGuide's cross-complaint was filed in September 2008, the company was prosecuting a legal malpractice action against Biggins, thereby acknowledging that Biggins represented the corporation in Madison's suit against Avail. It was not until October 2008, after MaqGuide amended its cross-complaint for legal malpractice to name only Madison, that MaqGuide claims to have put Biggins "on notice" that there was no probable cause to continue to prosecute the action. There is no evidence that between July 2006 and September 2008, MaqGuide or its counsel believed that it ought not to have been named in Biggins's fee dispute. Because Ehline was no longer representing Biggins when MaqGuide's "warnings" were ignored, he cannot be held liable for malicious prosecution.

In its response to the anti-SLAPP motion, MaqGuide disputed Ehline's contention that he did not represent Biggins after May of 2007. Thus, James Little, MaqGuide's attorney, submitted his declaration stating that "Long after Mr. Ehline claims to have substituted out of the case he appeared in court on Mr. Biggins'[s] behalf on or about October 22, 2008, to oppose an *ex parte* application . . . . While Mr. Biggins also appeared at this hearing, there is no question that Mr. Ehline was also present on behalf of Mr. Biggins such that Mr. Ehline's claim now not to have so appeared is just not accurate." After filing the Substitution of Attorney in May of 2007, Ehline was not attorney of record for Biggins in the underlying litigation. Little's declaration is not

competent evidence to the contrary. We note that Little does not declare that Ehline addressed the court as counsel for Biggins, nor does he provide admissible evidence, such as a reporter's transcript or minute order, to establish that Ehline was in fact representing Biggins subsequent to May 2007.

Second, MaqGuide presented no evidence that Ehline harbored any hostility or ill will toward MaqGuide, or that he prosecuted the action for an improper purpose, such as to deprive MaqGuide of the use of its property, or to force an unwarranted settlement. Indeed, MaqGuide does not even identify the nature of the malice it supposes motivated Ehline to prosecute the lawsuit. Rather, it relies on cases that suggest that an inference of malice may, in some circumstances, be drawn from evidence that an attorney *knew* that there was no probable cause to prosecute the underlying litigation. (See, e.g., *Sheldon Appel Co. v. Albert & Oliker, supra,* at p. 881.) However, MaqGuide offered no evidence that Ehline knew that there was no probable cause for Biggins's suit against it. (See, e.g., *Downey Venture v. LMI Ins. Co., supra,* 66 Cal.App.4th at p. 498 ["Merely because the prior action lacked legal tenability, as measured objectively, . . . *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's subjective malicious state of mind. In other words, the presence of malice must be established by other, additional evidence."].) Thus, even had MaqGuide established that Biggins lacked probable cause to prosecute his lawsuit against MaqGuide, no inference concerning Ehline's state of mind can been drawn from that premise.

Finally, MaqGuide makes much of the (disputed) fact that attorney Little conveyed to opposing counsel his conclusion that the lawsuit against the company lacked probable cause. However, Little's subjective belief that the lawsuit lacked probable cause is not evidence that Ehline shared that belief. Indeed, it is common for litigants to disagree with their adversaries about the merits of a case. Contrary to MaqGuide's apparent assumption, when an attorney informs opposing counsel that he thinks the case is meritless, counsel is not put on notice that he is acting maliciously; he is merely put on

notice of his adversary's position. (See, e.g., *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 223; *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 627.)

DISPOSITION

The order denying the anti-SLAPP motion is reversed and the matter is remanded to the trial court with instructions to grant the motion. Ehline is to recover his costs of appeal.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.